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Supreme Court, U.S.
FILED
AUG 23 1995
OFFICE OF THE CLERK

No. 95-317

In The

Supreme Court of the United States

October Term, 1995

ALLAN E. WOODBRIDGE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED FOR REVIEW

1. In this prosecution for knowingly possessing a machinegun, the district court rejected defendant's jury instruction that, "the prosecution must prove that defendant possessed an item which he knew to be a machinegun." Instead, the court instructed the jury that the government must prove the machinegun was possessed "knowingly" and that "An act is done knowingly if the defendant is aware of the act and does not act or fail to act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful. . . . "

Were the jury instructions in this pre-*Staples* trial defective under *Staples v. United States*, ___ U.S. ___, 114 S. Ct. 1793, 1802 (1994), for failing to insure that the government prove beyond a reasonable doubt that Mr. Woodbridge had "knowledge" that the item he possessed fit the statutory definition of "machinegun"?

2. The principal issues before the jury were whether the weapons fired automatically, whether their possession was permitted by BATF, whether they constituted machineguns, and whether Mr. Woodbridge's possession was "knowing." The district court admitted government evidence on these issues but excluded defendant's expert, lay, opinion, and demonstrative evidence on the same subjects because "[a]ll the government's witnesses" gave contrary "testimony" that was "absolutely clear."

QUESTIONS PRESENTED FOR REVIEW – Continued

Did the Ninth Circuit's decision to affirm conflict with this Court's decisions concerning the right to present a complete defense and to rebut government evidence, and with Fed. R. Evid. 402?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Allan E. Woodbridge respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit which became final on May 25, 1995.

DECISION BELOW

The Judgment and Sentence in this case was entered on June 8, 1994. The Court of Appeals filed its opinion affirming Mr. Woodbridge's convictions, but vacating his sentence and remanding for resentencing, on April 13, 1995. A copy of that memorandum disposition is attached as Appendix A. The Court of Appeals denied Mr. Woodbridge's timely filed petition for rehearing and rejected his suggestion for rehearing en banc on May 25, 1995. A copy of that order is attached as Appendix B.

JURISDICTION

The district court had original jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. The Ninth Circuit U.S. Court of Appeals had jurisdiction to review the district court's final order in this case under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(2). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered on May 25, 1995.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 18 U.S.C. § 922(o), with which Mr. Woodbridge was charged, provides:

> (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
>
> (2) This subsection does not apply with respect to –
>
> (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or
>
> (B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

The scienter requirement for that crime is contained in 18 U.S.C. § 924(a)(2), which provides:

> (2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

The statutory definition of "machinegun" appears at 26 U.S.C. § 5845(b), and it provides:

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts

> designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

The definition is made applicable to 18 U.S.C. § 922(o), the crimes charged against Mr. Woodbridge, by 18 U.S.C. § 921(a)(23), which provides:

> (23) The term "machinegun" has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b)).

U.S. Const. amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Allan Woodbridge is a federally licensed firearms dealer. The Indictment charged him with twelve counts of knowing possession of a "machinegun" on September 28, 1989, in violation of 18 U.S.C. § 922(o). Section 922(o) outlaws possession of a "machinegun" unless possession was authorized by a government "agency" or lawful possession began before 1986, when § 922(o) was enacted. A "machinegun" is a statutory term of art.[1] Possession is a crime only if it is "knowing." 18 U.S.C. § 924(a)(2).

Following this Court's decision in *Staples v. United States*, ___ U.S. ___, 114 S. Ct. 1793, the government must prove that the defendant knew the gun he possessed fit

---

[1] 26 U.S.C. § 5845(b), defining "machinegun," provides in full:

> The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

Title 18 U.S.C. § 921(a)(23) makes this definition applicable to 18 U.S.C. § 922(o).

the statutory definition of "machinegun" to obtain a conviction. This case was tried before *Staples* was decided. The district court rejected defendant's proposed instruction on this element and instead instructed the jury that such knowledge need *not* be proven. Argument § I.

Mr. Woodbridge attempted unsuccessfully to introduce evidence showing that the weapons charged did not fire automatically (to defeat the element of possession of a *machinegun*); that government evidence to the contrary was the product of mechanical sleights of hand and investigative agent bias; and, that the charged weapons were lawfully possessed under authoritative agency rulings (defeating the elements of *knowing* possession, possession of a *machinegun*, and *unlawful* possession). These were material, disputed issues. The district court prevented defense counsel from offering evidence on these factual matters – but allowed the government to do so. This deprived Mr. Woodbridge of Fifth and Sixth Amendment protections and violated the Federal Rules of Evidence. Argument § II.

Mr. Woodbridge was convicted as charged. The court sentenced him to 57 months in prison and ordered him taken into custody immediately.

REASONS FOR GRANTING THE WRIT

I. THE JURY INSTRUCTIONS WERE DEFECTIVE UNDER *STAPLES V. UNITED STATES* BECAUSE THEY FAILED TO INSURE THAT THE GOVERNMENT PROVED MR. WOODBRIDGE HAD "KNOWLEDGE" THAT WHAT HE POSSESSED FIT THE STATUTORY DEFINITION OF MACHINEGUN

A. Defendant's Rejected Instruction Concerning Knowledge and the Court's Instruction Concerning Knowledge

Defendant timely submitted a proposed jury instruction on "knowledge" which stated:

> KNOWLEDGE REQUIREMENT. The prosecution must prove beyond a reasonable doubt that the defendant knowingly possessed a machinegun. To fulfill this burden, the prosecution must prove *that defendant possessed an item which he knew to be a machinegun.* The defendant is not guilty if there is not proof beyond a reasonable doubt that the [sic] knew that an item he possessed is a machinegun.

CR:58, p.7 (emphasis added). The district court refused to give the instruction; defense counsel timely excepted. TR:404-05.

Court's Instruction No. 9, in contrast, stated:

> First, that the defendant possessed a machinegun;
>
> Second, that he did so knowingly; and
>
> Third, that he did so on or about the date charged in that Count.

Court's Instruction No. 11 then undermined the knowledge element by stating, in full:

> An act is done knowingly if the defendant is aware of the act and does not act or fail to act through ignorance, mistake, or accident. *The government is not required to prove that the defendant knew that his acts or omissions were unlawful.* You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

CR:65 (emphasis added).

B. The Ninth Circuit's Ruling

The Ninth Circuit acknowledged that *Staples* requires the government to prove that the defendant " 'knew of the features of his AR-15 that brought it within the scope of the Act.' " Memorandum Disposition (Appendix A), at App. 8 (quoting *Staples*, 114 S. Ct. 1793, 1802). The appellate court acknowledged that the instructions quoted above were the ones the district court gave to the jury. The Ninth Circuit ruled, however:

> . . . Taken as a whole, the instructions properly stated that the defendant must have knowingly possessed an item falling within the statutory definition of machinegun – *i.e.*, an item possessing the "features" of a machinegun. Defendant's suggestion that he must also have known of the illegality of his conduct is nothing more than an argument that his ignorance of the law should have excused him from liability.

Memorandum Disposition (Appendix A), at App. 9. The Ninth Circuit never compared the instructions given in Mr. Woodbridge's case to the erroneous instructions given in *Staples* to see how closely they matched, and that

court never denied that the defendant adequately preserved this argument by timely requesting instructions that defined the *mens rea* requirement properly.

C. A Defendant Cannot be Convicted of Violating 18 U.S.C. § 922(o) Unless He Knew the Gun He Possessed Fit the Statutory Definition of "Machinegun." The Ninth Circuit's Decision to the Contrary Conflicts with *Staples v. United States*

Title 26 U.S.C. § 5861(d) prohibits possession of an unregistered firearm, but contains no *mens rea* requirement at all. The district court in *Staples v. United States*, 114 S. Ct. 1793, rejected defendant's proposed instruction that the government "must prove beyond a reasonable doubt that the defendant 'knew that the gun would fire fully automatically.' " *Id.*, 114 S. Ct. 1793, 1796. Instead, that district court gave a jury instruction like the one given by the district court in Mr. Woodbridge's case:

> "The Government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic [which subjects it] to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation."

Id. (quoting transcript).

This Court reversed the conviction, holding that even under a gun statute that completely lacked a *mens rea* requirement, the government must prove beyond a reasonable doubt that the defendant had "knowledge" that the item he possessed fit the statutory definition of a firearm that is subject to registration. *United States v.*

Staples, 114 S. Ct. 1793. *Accord United States v. Ross*, 40 F.3d 144, 146 (7th Cir. 1995) (vacating similar conviction following *Staples* on 28 U.S.C. § 2255 motion); *United States v. Starkes*, 32 F.3d 100 (4th Cir. 1994).

Mr. Woodbridge is entitled to the benefit of *Staples* because the evidence presented in *Staples* was virtually identical to the evidence presented here. The evidence in *Staples* showed that upon execution of a search warrant, local police and BATF agents recovered from defendant's home an AR-15 assault rifle with an M-16 selector switch and several other M-16 internal parts, including a hammer, disconnector, and trigger; that BATF agents tested the AR-15 and it fired more than one shot with a single pull of the trigger; and that the defendant insisted that in his possession, the AR-15 had operated only semi-automatically and that he was ignorant of its automatic firing capabilities. The evidence in Mr. Woodbridge's case was basically the same.

Mr. Woodbridge is entitled to the benefit of *Staples* because the statuary scheme in *Staples* is virtually identical to the statutory scheme here. In *Staples*, this Court construed a statutory scheme where one law prohibits possession of an unregistered "firearm" (26 U.S.C. § 5861(d)); another law set the penalty (26 U.S.C. § 5871); and "firearm" includes "machineguns" (26 U.S.C. § 5845(a)(6)), which are defined in 26 U.S.C. § 5845(b). The statutory scheme in this case parallels that in *Staples*. One law prohibits possession of a "machinegun" (18 U.S.C. § 922(o)); another law sets the penalty (18 U.S.C. § 924(a)(2)); and "machineguns" are defined, here as in *Staples*, by 26 U.S.C. § 5845(b). *See* 18 U.S.C. § 921(a)(23) (making 26 U.S.C. § 5845(b)'s definition of "machinegun" applicable to offenses under § 922 et seq.). The subject of

both prohibitions (machineguns) is basically the same; the statutory structure is basically the same; the *mens rea* analysis should be the same, too. The only difference is that here, unlike in *Staples*, the law contains an explicit knowledge element. 18 U.S.C. § 924(a)(2) ("whoever *knowingly* possess . . . ") (emphasis added). The *Staples* conclusion is therefore compelled with even greater force in Mr. Woodbridge's case.

Mr. Woodbridge is entitled to the benefit of the *Staples* decision because the improper jury instruction given in *Staples* was similar in relevant respects to the jury instruction here. The objectionable instruction defining knowledge in *Staples* read:

> [A] *person is knowingly in possession of a thing if his possession occurred voluntarily and intentionally and not because of mistake or accident* or other innocent reason. The purpose of adding the word "knowingly" is to insure that no one can be convicted of possession of a firearm he did not intend to possess. *The government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic* [which subjects it] to regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation.

Staples, 114 S. Ct. 1793, 1806 n.5 (emphasis added) (brackets in original). The instruction defining knowledge in Mr. Woodbridge's case stated:

> *An act is done knowingly if the defendant is aware of the act and does not act or fail to act through ignorance, mistake,* or accident. *The government is not required to prove that the defendant knew that his acts or omissions were unlawful.* You may consider evidence of the defendant's

> words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

Court's Instruction No. 11 (emphasis added). The instruction listing the elements in *Staples* apparently defined the level of scienter necessary solely as "knowledge," without explaining of what the jury must conclude the defendant had "knowledge" to convict. The comparable instruction listing the elements in Mr. Woodbridge's case stated:

> First, that the defendant possessed a machinegun;
>
> Second, that he did so knowingly; and
>
> Third, that he did so on or about the date charged in that Count.

Court's Instruction No. 9. The objectionable portions of these instructions – *i.e.*, the provisions that "knowledge" means only defendant's awareness of his act of possession, the provisions that the government need prove only that the act of possession did not occur through ignorance, "mistake or accident," and the absence of any provision insuring that the jury must find the defendant knew the weapon he possessed had the characteristics (such as automatic firing capability) which brought it within the statutory definition of a machinegun – are identical.

Mr. Woodbridge is entitled to the benefit of the *Staples* decision, even though his trial was over before *Staples* was decided. *See United States v. Starkes*, 32 F.3d 100 (applying *Staples* in case under 26 U.S.C. § 5861(d)); *United States v. Licciardi*, 30 F.3d 1127 (9th Cir. 1994)

(discussing *Staples* in context of pre-*Staples* conspiracy conviction).

Thus the *Staples* analysis should apply here. Here as in *Staples*, "to obtain a conviction, the Government should have been required to prove that [defendant] knew of the features of his AR-15 that brought it within the scope of the Act." *Staples*, 114 S. Ct. 1793, 1796. Here as in *Staples*, the instructions failed to require that the jury find the defendant knew that the weapons fit 26 U.S.C. § 5845(b)'s definition of "machinegun."

The Ninth Circuit essentially concluded that what the jury had to find was that the defendant "knowingly" "possessed a machinegun," and that this self-evident phrase sufficed. *Staples*, however, made clear that this language is ambiguous about whether the defendant must know that he possesses the firearm, or that the firearm he possesses is a machinegun:

> The question before us is not *whether* knowledge of possession is required, but what level of knowledge suffices: (1) knowledge simply of possession of the object; (2) knowledge, in addition, that the object is a dangerous weapon; (3) knowledge, beyond dangerousness, of the characteristics that render the object subject to regulation, for example, awareness that the weapon is a machinegun.

Staples, 114 S. Ct. 1793, 1805 (Ginsburg, J., concurring) (emphasis in original).

The instruction requiring the jury to find that Mr. Woodbridge "knowingly" possessed a machinegun is therefore reversible error under *Staples*. The Ninth Circuit's conclusion to the contrary directly conflicts with

this Court's decision and certiorari should be granted for that reason.

II. THE DISTRICT COURT EXCLUDED VIRTUALLY ALL OF DEFENDANT'S EVIDENCE ON MATERIAL DISPUTED ISSUES SUCH AS WHETHER THE WEAPONS WERE AUTOMATIC AND WHETHER BATF PERMITTED THEIR POSSESSION, BUT ALLOWED THE GOVERNMENT TO INTRODUCE EVIDENCE ON THESE MATTERS. THE NINTH CIRCUIT'S DECISION TO AFFIRM CONFLICTS IN PRINCIPLE WITH THIS COURT'S DECISIONS CONCERNING A CRIMINAL DEFENDANT'S RIGHT TO CALL WITNESSES AND PRESENT A DEFENSE, AND WITH FEDERAL RULE OF EVIDENCE 402

A. The Basic Factual Issues Before the Jury

In Counts I-IV, the alleged machineguns were AR-15 type rifles. The evidence showed that an AR-15 is a legal, semiautomatic, civilian version of the military M-16 rifle. By changing parts or modifying parts, an AR-15 rifle can be made to function as an M-16, that is, to fire automatically (*i.e.*, to fire more than one round with a single trigger pull). The key fact issues concerning Counts I-IV were (1) whether the charged rifles fired automatically; (2) if so, did that result from manipulation of the weapons by government agents after they seized the rifles; (3) even if the rifles were machineguns, did defendant know they were; and, (4) were they lawfully possessed under BATF agency rulings?

In Counts VI-IX, the alleged machineguns were Sten "tubes" and in Count V, a Sten tube plus parts. The evidence showed that a "Stengun" was a World War II

vintage British military weapon. The parties disputed whether the tube is a complete receiver for a Sten gun and whether it was configured solely for automatic fire. The factual issues concerning these Counts before the jury were: (1) is a "tube" a "machinegun"; and (2) if so, did Mr. Woodbridge know?

In Counts X-XII, the alleged machineguns were destroyed "receivers" of Thompson machineguns (the famous Tommy gun used by Elliot Ness et al.). The receivers were cut in half lengthwise, so they could not even hold, much less fire, a bullet. The factual issues concerning these Thompson parts were: (1) did they constitute a machinegun, *i.e.*, could they be "readily restored" to automatic firing capability; and (2) if so, did Mr. Woodbridge know?

B. The Evidence Relevant to these Factual Issues that the District Court Excluded, and Defendant's Objections

1. The district court precluded defendant from calling witnesses to testify that the AR-15 rifles charged in Counts I-IV fired semi-automatically

To obtain a conviction, the government had to prove that Mr. Woodbridge possessed an "automatically" firing machinegun. 26 U.S.C. § 5845(b); *United States v. Evans*, 978 F.2d 1112, 1113 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 114 S. Ct. 78 (1993).

The government acknowledged that it needed to prove that each rifle fired automatically. To carry its burden, the government presented four witnesses who testified that the AR-15's fired automatically and that if

they fired automatically they were machineguns. One of these witnesses also narrated a videotape which he said showed the AR-15 rifles in this case firing automatically.[2]

On the other hand, the court barred three defense witnesses from testifying that the guns charged in Counts I-IV fired semiautomatically. Two of them would have also testified that the guns in Counts I-IV were semiautomatic rifles but that they could be, and were, made *to appear* to fire automatically by the government's video. TR: 196. The district court acknowledged the factual dispute about whether the weapons fired automatically or semiautomatically:

> MR. DEJEAN [defense counsel]: Judge those guns were not firing fully automatic.
>
> THE COURT: Well, see, that's argument.
>
> MR. DEJEAN: Well but I mean –
>
> THE COURT: More than one round came out of there.

TR:206. Then the district court excluded the defense evidence on this issue:

> *If your witnesses are going to testify that they tested these guns, all of them and found that they're*

---

[2] TR:88 (testimony of BATF Agent Silva that four rifles fired automatically); TR:108-23; 133 (testimony of Off. Craig that two or three of the AR-15 rifles test fired automatically); TR:190 (same); TR:250 (testimony of BATF Agent Krogh that one AR-15 fired automatically); TR:318-20 (testimony of expert Richard Craze that if there was testimony that the guns fired automatically, then they were machineguns). Agent Silva's testimony included narration of a videotape which he said showed the AR-15 rifles firing automatically. TR:163.

> *semiautomatic or single shot, that offer of proof will be denied as to those witnesses. It's that simple.*

TR:215 (emphasis added).

Similarly, the district court acknowledged the factual dispute about whether the government agent made semiautomatic fire appear to be automatic fire: "There has been testimony by Agent Silva and former deputy sheriff Craig that one of those weapons was off, when Agent Silva fired it, it was automatic." TR:198. "Now they've got a witness that says it isn't." *Id.* Then the court excluded the defense testimony on this issue. TR:215.

2. The court precluded the defendant from calling experts to explain how the government's video used a mechanical sleight of hand called "slam-firing" to make it appear that the AR-15 rifles charged in Counts I-IV fired automatically

One government agent's test firing of the AR-15's was videotaped. The tape was admitted as proof (Ex. 11) that the rifles fired automatically.

The defense proffered four witnesses to challenge the government videotape. One witness would have explained how the agent in the government's video used a mechanical sleight of hand called "slam-firing" to make semiautomatic fire appear to be automatic. TR:202-03. "[Defense witness] Mr. Karwan has seen those videos. He will directly contradict both the testimony of Mr. Silva and what appears to be depicted on that video." TR:367. He would have used his own video to illustrate his testimony.

The district court excluded his testimony on the ground that the government's evidence to the contrary was so strong:

> THE COURT: Well, any reasonable person looking at that TV [the government's video] knows those weapons were firing automatically.
>
> MR. DEJEAN: And they're wrong, Judge. I grant you that's – that's the first impression, but they're wrong. I – you know, I grant you that's the first impression, but they are wrong. Those guns were semiautomatic rifles and we will demonstrate that to the court and the jury.
>
> THE COURT: Now you're arguing apples and oranges.
>
> MR. DEJEAN: Well, I don't think so.
>
> THE COURT: What you're saying, what you're saying, this witness is going to say that what the jury thought they saw they didn't see?
>
> MR. DEJEAN: That's correct. That's exactly what he's going to –
>
> THE COURT: That is argument.

TR:201.

> The jury can very well tell on their own. They don't need somebody to tell them whether the trigger was pulled once or twice.

TR:202-03. "Well it [calling the defense witness on this issue] will be denied."

Defense counsel sought to call another witness to testify "on this concept of slam firing." TR:362.[3] This

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[3] *See also* CR:91, Declaration of Donald A. Manning at p. 7 (explaining two methods by which a semiautomatic can be made to appear to be firing automatically); *id.* p. 8 (expert opinion that the videotape of BATF Agent Silva firing four AR-15's in what appears to be automatic mode was actually

second witness also would have used a video showing the AR-15's firing semiautomatically to illustrate his testimony. TR:196. The court excluded this testimony. TR:362-63.

Defense counsel offered testimony of a third witness on this topic:

> MR. DEJEAN: Mr. McCann has examined these guns, and he was present at the Pierce County firing range when all of those guns were there, and *he heard Agent Silva testify that he has convicted at least 20 men by slam firing*. Now, slam firing is another method whereby guns are made to appear to fire in a fully automatic mode but are not. Mr. McCann heard Mr. Silva say that.

TR:217-18 (emphasis added). The court excluded that testimony. *Id.*

Defense counsel attempted to call another witness to testify (in contradiction to the government's expert) that the government's videotape could make it appear that a gun fired fully automatically when in fact it was firing semiautomatically. The district court excluded this testimony *on the ground that it would contradict the government's witnesses*:

> THE COURT: All the government's witnesses, Mr. DeJean, say in their opinion, in their testimony to this jury: One pull of the trigger. Not two, three or four. One pull and it sets off [automatically]. Not two, three or hesitant [sic] or

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achieved by Agent Silva manipulating the trigger to attain what appears to be automatic fire on what is actually a semiautomatic weapon).

> anything else. It's absolutely clear, and all of them were tested that way.

TR:366.

In contrast, the court permitted the government to present its video, replay it during closing argument and replay it for the jury – in the defendant's absence – during deliberations. TR:484-88.

3. The court precluded the defendant from calling an expert or introducing documents showing that authoritative agency rulings call AR-15's with M-16 parts (with which Mr. Woodbridge was charged in Counts I-IV) legal, semiautomatic weapons

The government could not obtain convictions on Counts I-IV unless it proved the element of "knowing" possession of an automatically firing machinegun (18 U.S.C. § 924(a)(2); *Staples v. United States*, 114 S. Ct. 1793), and disproved the defense of possession "under the authority of, the United States or any . . . agency thereof" (18 U.S.C. § 922(o)(2)(A)-(B)). The district court, however, precluded the defendant from calling an expert to testify about authoritative agency rulings calling AR-15's with M-16 parts (with which Mr. Woodbridge was charged in Counts I-IV) legal, semiautomatic weapons. TR:361-63. The district court also excluded proffered BATF rulings to the same effect. TR:204.

The district court then allowed the government to admit evidence to the contrary. During government cross-examination of Mr. Manning, the prosecutor asked for the basis of his opinion that possession of the AR-15 with M-16 parts was legal. Mr. Manning answered, "There was

a letter issued from the Bureau of Alcohol, Tobacco and Firearms to Mr. T.F. LaFrance stating that – " TR:387. Government counsel cut him off by asking, "Do you have that letter?" TR:387. Since Mr. Manning did not have it with him at the witness stand, the government moved on and did not allow Mr. Manning to finish his answer. The implication was that since the letter was not produced, it did not exist.

On redirect examination, of course, defense counsel attempted to introduce the very letter about which the government asked on cross-examination. TR:390. "It's the LaFrance Letter that you mentioned," *id.*, defense counsel explained. Incredibly, the court excluded the letter: "Is that what it is? It will be denied." *Id.*[4]

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[4] The court prevented defense expert Manning from testifying,

> . . . on a ruling issued by BATF and which is commonly known as the LaFrance Ruling. This ruling by BATF stated that an AR-15 with the M-16 fire control parts could be possessed by a person licensed as a manufacturer (Title II, Class III Firearms Licensee) in conjunction with an auto-sear. The only restrictions placed by BATF upon possession of this rifle and these parts was that the auto-sear could not be placed in the rifle without, at that point in time, registering the assembled rifle. It is my understanding that the four auto-sears seized at the Woodbridge residence were not found in rifles but were found in his bedroom. As such, these auto-sears and these rifles would have been absolutely legal under BATF rulings.

CR:91, Declaration of Donald A. Manning, at p. 5.

4. The court precluded defendant from calling witnesses to show the bias of BATF Agent Silva, who fired the weapons in Counts I-IV, prepared the video, and testified that they were automatic machineguns

The government moved *in limine* to exclude evidence that Mr. Woodbridge was tried and acquitted on criminal charges for possession of the same weapons in state court. After his acquittal, and before the federal indictment was filed, Mr. Woodbridge filed a federal civil rights action. BATF Agent Silva was a defendant. At the time of Mr. Woodbridge's criminal trial, government counsel represented that the civil lawsuit was dismissed "and is pending on appeal." The government argued that the criminal and civil cases were irrelevant and would be confusing to the jury. The defense argued that evidence of the lawsuits was relevant to show bias of the government's key witness, BATF Agent Silva. TR:6-7. The court excluded the evidence.[5] TR:8.

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[5] While the jury was deliberating, the court made clear that *it*, not the jury, was resolving the potential issue of bias.

> MR. DEJEAN: No, Judge, you asked me why we're here today, why this proceeding is going on. This proceeding is going on because this man filed a civil action against these agents, and that's when, three and a half years after all of this, that's when they decided they were going to prosecute him federally. Now, that's what happened in this case. That's the explanation for it . . .
>
> * * *
>
> MR. REDKEY: I personally handled the initiation of the prosecution of this case, and I will say as an officer of the court that the pending civil litigation

5. The court precluded the defendant from presenting evidence that the weapons charged in Counts I-IV were in brand new condition and, hence, that he could not know if they would fire automatically

To obtain convictions on any count, the government had to prove that Mr. Woodbridge had "knowledge" that the parts or weapons he possessed fit the statutory definition of "machinegun." 18 U.S.C. § 924(a)(2); *Staples v. United States*, 114 S. Ct. 1793. The district court prevented the defendant from presenting evidence to show that he did not know the AR-15 rifles charged in Counts I-IV purportedly fired automatically.[6]

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had absolutely no bearing on our position to go forward with a federal prosecution.

* * *

THE COURT: If that calls for a finding, Mr. Redkey, I have no question that the government and the agents involved didn't do anything but do it in the line of duty.

MR. REDKEY: Thank you, Your Honor.

TR:508.

[6] Proposed defense expert Richard Schefsky would have testified that based upon his expert knowledge and his detailed examination of the weapons and their internal parts, "there was no evidence that they had been fired in an automatic fashion. . . . The chambers of the barrels of several of these rifles still contained the 'wax-like' substance as applied at the time of manufacture which, again, would be indicative of very little, if any, use. These firearms were in a 'like new' condition." CR:91, Declaration of Richard Schefsky, at p. 2.

6. The court precluded the defendant from presenting evidence that the Sten tubes from Counts V-IX were not machineguns, because they were not "designed and intended" "solely and exclusively" to "convert[ ]" a weapon to a machinegun

To obtain convictions on Counts V-IX (the Sten tubes), the government had to prove that they were "any part *designed and intended solely and exclusively*, or combination of parts *designed and intended*, for use in converting a weapon into a machinegun." 26 U.S.C. § 5845(b) (emphasis added).[7]

The defense would have called Mr. Karwan to testify that the Sten tubes in Counts V-IX were not automatic weapons: "It would be just as likely that they could be assembled into a 'dummy' Sten gun which would be, by definition, a non-firing Sten gun." Mr. Karwan was not allowed to testify.

7. The district court precluded defendant's expert testimony that the separate Thompson parts (Counts X-XII) could not be "readily restored" to automatic machineguns

To obtain a conviction on Counts X-XII, charging possession of separate weapons parts, the government

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[7] As to Count V, which includes several parts, the government might also obtain a conviction by proving they were "any combination of parts from which a machinegun can be assembled." *Id.* Since Counts VI-IX charge only a single part, however, the government could not rely on this portion of the definition of machinegun to obtain a conviction on those counts.

had to prove that the separate parts could be "readily restored" into a machinegun. 26 U.S.C. § 5845(b). Richard Karwan would have testified that the guns were properly disassembled and "deactivated" so that they could not be reassembled "without considerable welding, cutting and milling." He was not permitted to do so. Richard Schefsky would have testified that the government's tests on the Thompson upper receivers were insufficient to determine whether those parts were automatic machineguns. He was not permitted to do so.

8. The district court precluded two witnesses who would have testified that Mr. Woodbridge made his auto sears in a gunsmithing course at Green River College in 1979

The government introduced evidence that four auto sears were found at Mr. Woodbridge's home during the search. Defense counsel objected on the ground that these parts were not charged in the indictment; he was overruled. The government introduced photos of the auto sears. Defense counsel objected on the ground that "they're not part of the case." The photos were admitted. *Id.*[8] One agent testified for the government, "The sears, in combination with the parts found in the gun, all the machine gun parts, the auto sear ensures or increases that probability that the gun will fire fully automatically."

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[8] Further testimony about and photographs of other auto sears were admitted, TR:95, 96, 97, 98, 126-27, over consistent defense objections: "They're not part of the case. They're not illegal to possess. They haven't been tied into this case in any shape or manner or form." TR:130. The objections were always overruled and the auto sears were admitted. *Id.*

In response, defense counsel sought to call two witnesses (Messrs. Patterson and Blansett) to testify that Mr. Woodbridge was a student at Green River College in 1978, and that they remember Mr. Woodbridge making the auto sears there at that time (in a gunsmithing course). This testimony was relevant because, as the government clearly conceded at trial: "The law on auto sears is that if the auto sear was manufactured before 1981, it is not illegal. It's not considered a machine gun part and it's perfectly legal." The court excluded these witnesses, even though it admitted the auto sears into evidence.

The defense clearly had the better of this argument, and the government was forced to admit it – although the court never did. Government expert Mr. Craze testified that he did not know if the auto sears were manufactured before 1981, and he acknowledged that BATF has a written policy that an auto sear manufactured before 1981 is perfectly legal. In rebuttal closing government counsel even conceded that auto sears manufactured before 1981 are legal, and explained that was why they were not charged: "There is no proof that those auto sears were made after 1981. We could not have carried our burden of proof." "The auto sears really had nothing to do with this case." Notwithstanding the government's concession that the auto sears were irrelevant, they remained in evidence, over defense counsel's clear objections, as additional inflammatory evidence.

9. The court precluded defense opinion evidence

The district court excluded defense opinion evidence:

> Q. Mr. Manning, does the possession of these receiver tubes and these parts violate any regulation of the ATF or anything –
>
> MR. NICKELL: I object to that, Your Honor.
>
> THE COURT: I sustain the objection.

TR:384. The government, however, was permitted to present the opinion testimony of Agent Silva on exactly this point.[9]

10. The government exploited the court's admission of its evidence and preclusion of Mr. Woodbridge's defense in all areas

The government argued in closing: " . . . Doug Craze testified that he examined those two guns and that in his expert opinion they contained automatic weapons parts and that they would fire in fully automatic mode." TR:423. It continued: "And you saw that picture: Pull the trigger, and the burst of about 10 rounds came out immediately, automatically." TR:425. The prosecutor continued in rebuttal closing:

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[9] For example, Agent Silva testified: "It is in and of itself a machine gun when in combination with those other parts." Similarly, the government elicited testimony from its witness Lori Tkaczak about what firearms are legal. It elicited opinion testimony from its expert Mr. Craze that charged parts "would be classified as a frame of a receiver of a machine gun; therefore, a machine gun as defined."

> . . . [W]hat [defense counsel] is suggesting, and I think all of this came out in what was said without being said, is there was some tampering with these firearms; that ATF, *for some reason undisclosed,* tampered with those firearms to make them fire in the fully automatic mode. And I think the expression that he used was that the guns were "monkeyed around with" by ATF. . . .
>
> Now, closing argument is supposed to be based on the facts . . .
>
> Did Mr. DeJean do his job in that regard to you? Did he argue facts from which he could support an argument that they "monkeyed around with" the guns? *What is the evidence that they monkeyed around with the guns? There is none.*
>
> * * *
>
> There wasn't one single question on cross-examination, and *no witnesses from the defense,* to support that reckless argument that these were monkeyed with. None.

TR:470-71 (emphasis added).

> *Not a single shred of evidence* to support that argument that they were monkeyed with.

TR:472 (emphasis added).

> . . . Special Agent Silva then test-fired the guns on September 27, 1989. Detective Krogh was there. Detective Jenkins was there. All three people there. There's *not a single shred of evidence* that any one of those men did anything to monkey with those guns.

Id. (emphasis added). The "missing evidence" to which government counsel pointed, all had been excluded.

C. Exclusion of Defense Evidence Denied Mr. Woodbridge the Constitutional Rights to Present a Defense, to Call Witnesses, to Confrontation, and to Due Process, and Was Contrary to the Federal Rules of Evidence

The proffered defense evidence on disputed, material, issues of fact was relevant, Fed. R. Evid. 401, and admissible, Fed. R. Evid. 402. Exclusion of such evidence denied Mr. Woodbridge the constitutional rights to present a defense, to call witnesses, to confront witnesses, and to due process.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (citations omitted). It is rooted in the due process right to present a defense, the Sixth Amendment right to compulsory process (*Perry v. Rushen*, 713 F.2d 1447, 1450 (9th Cir. 1983), *cert. denied*, 469 U.S. 838 (1984)), and the Sixth Amendment right to confrontation. *See Washington v. Texas*, 388 U.S. 14, 19 (1966).[10]

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[10] *Accord* Taylor v. Illinois, 484 U.S. 400, 408-09 (1988) (fundamental Sixth Amendment right to present witnesses and a defense); Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987) ("Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilty."). *Cf.* Rock v. Arkansas, 483 U.S. 44 (1987) (state rule excluding defendant's refreshed testimony violates Sixth Amendment rights to compulsory process and to present a defense and right to due process, as well as Fifth Amendment right to testify).

The right to present witnesses cannot be denied where the testimony is critical to the defense and directly relevant to guilt or innocence. *Chambers v. Mississippi*, 410 U.S. 284, 302 (rejecting even hearsay testimony is improper where it "bore persuasive assurances of trustworthiness," "was critical to Chambers' defense," and "directly affect[ed] the ascertainment of guilt."). As described above, that was exactly the case at Mr. Woodbridge's trial.

The right to present witnesses is especially strong where the witnesses would *rebut* evidence introduced by the government from which the jury might infer an element of the crime. *See Skipper v. South Carolina*, 476 U.S. 1, 5 n.1 (1986); *United States v. Whitman*, 771 F.2d 1348, 1351 (9th Cir. 1985) (error to prevent defendant from rebutting evidence introduced by government from which jury might infer motive); *United States v. Armstrong*, 621 F.2d 951, 953 (9th Cir. 1980) (error to exclude testimony that another man fit description of the robber and used "bait" money to buy car). That was also the case at Mr. Woodbridge's trial.

The right to present a defense is fundamental, *Chambers v. Misssissippi*, 410 U.S. 284, 302, and can be limited only by a sufficiently compelling contrary interest. *Cf. Taylor v. Illinois*, 484 U.S. 400 (no violation of Sixth Amendment's compulsory process clause where trial court precluded defense witness' testimony as sanction for defense counsel's discovery rule violation); Fed. R. Evid. 403. No countervailing interest in excluding relevant witness testimony was presented here.

Given the relevance of whether the weapons and parts here fired automatically or not, were knowingly

possessed or not, and were lawfully possessed under agency rulings or not, it was also error under Fed. R. Evid. Rule 402 for the district court to exclude Mr. Woodbridge's defense witnesses. *United States v. Blaylock*, 20 F.3d 1458 (9th Cir. 1994) (reversing conviction because district court excluded exculpatory medical records).

The Ninth Circuit's decision to the contrary conflicts with this Court's controlling authority concerning a criminal defendant's Fifth and Sixth Amendment rights to call witnesses and present a complete defense. The Ninth Circuit's decision to the contrary also conflicts with Fed. R. Evid. Rule 402.

CONCLUSION

For all of the foregoing reasons, petitioner Allan E. Woodbridge prays for the issuance of a writ of certiorari to resolve these issues. Alternatively, Mr. Woodbridge asks this Court to grant certiorari, summarily vacate, and remand for reconsideration in light of *Staples v. United States*, ___ U.S. ___, 114 S. Ct. 1793.

DATED this 23rd day of August, 1995.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALLAN EDWARD WOODBRIDGE, Defendant-Appellant.	No. 94-30213 D.C. No. CR-93-02548-JET **MEMORANDUM*** (Filed Apr. 13, 1995)

Appeal from the United States District Court for the Western District of Washington, Jack E. Tanner, District Judge, Presiding

Argued and Submitted February 6, 1995
Seattle, Washington

Before: SKOPIL, HALL, and WIGGINS, Circuit Judges.

Allan Edward Woodbridge appeals his conviction and sentence on twelve counts of knowingly possessing machineguns in violation of 18 U.S.C. §§ 922(o) and 924(a)(2). We affirm Woodbridge's conviction, but remand for resentencing.

I.

Woodbridge contends that the district court committed constitutional error in excluding various items of

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

evidence. After conducting a *de novo* review of the record, we conclude that the court did not so err.

(a) The AR-15's

(i) Proffered testimony on "slam-firing" and manual manipulation

Woodbridge argues that the district court erred in excluding his evidence that the four AR-15 rifles charged in the indictment fired semiautomatically, thus preventing him from negating one element of the offense – i.e., possession of an automatic weapon. *See* 18 U.S.C. § 922(o); 26 U.S.C. 5845(b). We disagree.

According to Charles Karwan, two of the AR-15's in the Government's videotape were "slam-firing." [CR 91, Karwan Affidavit] With respect to those two weapons, however, Karwan is careful to point out that "this type of 'slam-firing' firearm is not functioning in a reliable fashion *and cannot be duplicated at will.*" [CR 91, Karwan Affidavit at 3] This statement made by Woodbridge's own expert severely undermines Woodbridge's allegation that all of the AR-15's were being deliberately manipulated.

Karwan also would have testified that the other two AR-15's shown in the Government's videotape were being deliberately manipulated to simulate automatic fire, but were actually firing in a semiautomatic fashion. An expert may only testify on a proper subject for expert testimony. *United States v. Rahm*, 993 F.2d 1405, 1409 (9th Cir. 1993). The district court's view of the proffered testimony as an "improper subject" for expert testimony is revealed in its comment that "[t]he jury can very well tell

[whether Silva was manipulating the weapons] on their own. They don't need somebody to tell them whether the trigger was pulled once or twice." [TR 202-03] *See Rahm*, 993 F.2d at 1413 ("Our 'proper subject' inquiry has generally focused upon whether the expert testimony improperly addresses matters within the understanding of the average juror.") We agree that Karwan's testimony was not a proper subject for expert testimony.[1]

Defendant's final argument with respect to the Government's videotape is that replaying it during jury deliberations outside the presence of the defendant placed undue emphasis on the tape's validity. We are persuaded that replaying the tape was harmless beyond a reasonable doubt.

(ii) Proffered testimony of Manning and Jassaud

The district court properly excluded the proffered testimony of Donald Manning and Detlaf Jassaud because that testimony was not relevant to the AR-15s' ability to fire automatically. Both witnesses would have testified that the rifles fired in semiautomatic mode. Additionally, defendant sought to introduce a video of one of the guns

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[1] Additionally, by counsel's own admission, the purpose of Karwan's testimony was to impugn Silva's credibility. [TR 209, 211] Expert testimony introduced "to bolster or impugn the credibility of a witness is properly excluded." *Id. See also United States v. Komisaruk*, 885 F.2d 490, 494 (9th Cir. 1989); *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985). Defendant could have attempted to undermine Silva's credibility through cross-examination, but, for some reason, chose not to do so.

firing in a semiautomatic fashion. [TR 196] The Government does not disagree that each of the weapons can be made to fire semiautomatically as well as automatically, and even stipulated to that fact. [TR 197] Because there is not a shred of evidence in the record that the two modes of firing are mutually exclusive, the semiautomatic capability of the rifles does not tend to negate the capacity of the guns to fire automatically. Defendant had the opportunity to present witness testimony that the weapons were examined and found to be incapable of firing in an automatic mode, but did not do so.

(iii) BATF rulings

Woodbridge next contends that the district court made evidentiary rulings that prevented him from rebutting the Government's proof of a second element of the charged offense – i.e., "knowing" possession of a machinegun. *See* 18 U.S.C. § 924(a)(2). Woodbridge sought to introduce Manning's testimony on the legality of Woodbridge's possession of the AR-15's under rulings made by the Bureau of Alcohol, Tobacco and Firearms ("BATF"). The district court properly excluded this testimony. It is "well settled" that the judge, and not an expert, instructs the jury on the law. *United States v. Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir. 1993) (court's admission of expert testimony on contested issues of law in lieu of instructing the jury was manifestly erroneous).

Woodbridge also contends that the district court erred in excluding a BATF "ruling" indicating that AR-15 rifles containing M-16 parts are legal when possessed in conjunction with an uninstalled auto sear. The so-called

"ruling" offered by defendant is a March 11, 1981, letter issued by the BATF to a Mr. T.F. LaFrance (the "LaFrance letter"). The district court properly excluded the letter. Because it was not addressed to Woodbridge and was not issued pursuant to the BATF's official rulemaking procedures[2], Woodbridge's alleged reliance upon it was ill-founded. Aside from Mr. Manning's inadmissible testimony, defendant presents no evidence that the LaFrance letter was actually an official ruling.

(b) The Stens

Woodbridge next contends that the Government was required to prove that the Sten tubes charged in the indictment were "any part designed and intended *solely and exclusively,* or combination of parts *designed and intended,* for use in converting a weapon into a machinegun." *See* 26 U.S.C. § 5845(b). Defendant argues that he should therefore have been permitted to present Karwan's testimony on the possible innocent uses of the Sten tubes. The implication is that the Government was not entitled to rely on any other portion of section 5845(b) in proving its case.

By focusing exclusively on one portion of the machinegun definition, defendant ignores the fact that the Government presented overwhelming evidence to support its theory of the case – i.e., that the Sten tubes were machinegun "receivers" that could be used in conjunction with a Sten machinegun parts kit also found in

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[2] 27 C.F.R. § 71.41 (detailing formal rulemaking procedures).

Woodbridge's possession, to assemble a machinegun within the meaning of section 5845(b).[3] The exclusion of Karwan's testimony was proper.

(c) Thompson machinegun receivers

Woodbridge contends that because the Government had to prove that the Thompson submachinegun parts could be "readily restored" into a machinegun pursuant to section 5845(b), the court erred in excluding Karwan's testimony that the parts could not be reassembled "without considerable welding, cutting and milling," and Schefsky's testimony that the Government's tests on the Thompson upper receivers were insufficient to determine whether those parts were automatic weapons. We disagree.

The district court requested an offer of proof as to the anticipated testimony of defendant's witnesses. [TR 192] Our reading of the transcript reveals that defendant's counsel only offered Karwan's proposed testimony on the AR-15's. [TR 215] Thus, defendant cannot accurately say that the court erroneously excluded testimony that the Thompson parts could not be "readily restored" into a machinegun. Similarly, defendant's counsel only informed the court that Schefsky would testify about the

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[3] Defendant also contends that the court erred in excluding Manning's testimony that it was possible to possess a legal, semi-automatic Sten. A reading of the transcript reveals that Manning would have given his expert opinion on the legal significance of BATF regulations. Such testimony, as analyzed above, is not a proper subject for an expert. [TR 384]

results of his microscopic examination of the AR-15's. [TR 199]

(d) Agent Silva's bias

Defendant next attacks the district court's in limine ruling excluding evidence that Woodbridge was acquitted of machinegun possession in a state criminal proceeding and that he brought a civil suit against Silva in federal court that was dismissed.[4] Defendant contends that these proceedings are relevant to show Silva's bias.

The district court's ruling was proper. Because Silva gave prior sworn testimony during Woodbridge's state trial, any inconsistencies could have been brought out on cross-examination had defense counsel chosen to do so.

Defendant also sought to introduce the testimony of a Mr. McCann that "he heard Agent Silva testify that he has convicted at least 20 men by slam firing." [TR 217-18] Opening Brief at 9. Such testimony was properly excluded as inadmissible hearsay. Silva was available at trial and was cross-examined by defendant's counsel. As noted by the district court, counsel did not explore Silva's credibility and alleged bias on cross-examination.

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[4] That case, *Woodbridge v. United States*, No. 93-35821, was calendared with the present appeal. We affirmed the district court's judgment.

(e) Evidence on auto sears

Defendant next contends that the district court erred in excluding testimony from two of defendant's professors that Woodbridge made the four auto sears found in his possession in 1978 while a gunsmithing student at Green River College. The significance of this testimony, defendant argues, is that auto sears manufactured before 1981 are not illegal. Opening Brief at 18.

The parties present contradicting arguments concerning the legality of an [sic] pre-1981 auto sear possessed in conjunction with an AR-15 equipped with M-16 parts. Neither party cites any cases, official BATF rulings or statutes to support their position. It is unnecessary for us to resolve the issue, however, because there was undisputed testimony that the weapons fired in automatic mode even without the placement of an auto sear. Therefore, the district court did not err in excluding the proffered evidence.

II.

Woodbridge next attacks the district court's instructions on the knowledge element of the machinegun offenses. We conclude that the court's instructions were proper.

The Supreme Court's decision in *Staples v. United States* requires the Government to prove that the defendant "knew of the features of his AR-15 that brought it within the scope of the Act." *Staples v. United States*, 114 S. Ct. 1793, 1802 (1994). The district court in the present case instructed the jury that the Government must prove

beyond a reasonable doubt "[f]irst that the defendant possessed a machinegun; [s]econd, that he did so knowingly; and [t]hird, that he did so on or about the date charged in that Count." Next, the court read the statutory definition of "machinegun" to the jury verbatim. Finally, the court instructed the jury that "[a]n act is done knowingly if the defendant is aware of the act and does not act or fail to act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful." [SER 33]

Defendant incorrectly contends that the district court undermined the knowledge requirement by stating that the Government need not prove that the defendant "knew that his acts or omissions were unlawful." Taken as a whole, the instructions properly stated that the defendant must have knowingly possessed an item falling within the statutory definition of machinegun – i.e., an item possessing the "features" of a machinegun. Defendant's suggestion that he must also have known of the illegality of his conduct is nothing more than an argument that his ignorance of the law should have excused him from liability. It is clear, however, that "[t]he *mens rea* presumption requires knowledge only of the facts that make the defendant's conduct illegal, lest it conflict with the related presumption, 'deeply rooted in the American legal system,' that, ordinarily, 'ignorance of the law or a mistake of law is no defense to criminal prosecution.' " *Staples*, 114 S. Ct. 1806, n. 3 (Ginsburg, J., concurring).

III.

Woodbridge contends that there was insufficient evidence that he knew he possessed machineguns. We disagree. There was sufficient evidence for a reasonable jury to find that defendant knew the AR-15's could be fired automatically. In brief, the prosecution established that defendant was a gunsmith and a federally licensed firearms manufacturer who had fired machineguns in the past. [TR 267, 278] One of the charged weapons was a loaded custom-made gun that bore his nickname and the name of his gun shop. Further circumstantial evidence is the fact that each weapon had an external selector switch that rotated into the full automatic position; one of the guns was found with its fire selector in that position. Given Woodbridge's professional and educational background, it would not be unreasonable for a jury to infer that he knew the weapons could be fired in automatic mode.[5] Similarly, a rational jury could have inferred, based on Woodbridge's expertise, that he knew the Sten and Thompson receivers fell within the statutory definition of "machinegun."

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[5] Woodbridge contends that the district court erroneously excluded the testimony of metallurgist Richard Schefsky, who would have testified that one of the weapons appeared to be new, and that the others did not appear to have been fired in the automatic mode. [TR 199] [CR 91, Schefsky Affidavit] Even assuming, *arguendo*, that the court erred in excluding this evidence, there was sufficient circumstantial evidence of Woodbridge's knowledge to render the error harmless beyond a reasonable doubt.

IV.

Defendant contends that the district court erred in failing to hold an evidentiary hearing before sentencing him. Federal Rule of Criminal Procedure 32(c)(3)(A) expressly vests a district court with discretion to hold an evidentiary hearing. U.S.S.G. § 6A1.3(a) provides that "[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor." The Commentary to section 6A1.3 indicates that written statements of counsel and witness affidavits may be adequate under many circumstances. Here, defense counsel submitted witness affidavits. [CR 91, 92; ER 15, 46] Counsel informed the court that he preferred to introduce his evidence through live testimony, but that the witnesses would not say anything that was not in the declarations. [ER 234] We are persuaded that the district court did not err in failing to hold an evidentiary hearing.

(a) Abuse of position of trust/special skill

In the case at bar, defense counsel alleged factual inaccuracies, challenging, *inter alia*, the PSR's contention that Woodbridge abused his trust or used a special skill in committing the possession offenses. The district court did not make separate written findings on this point, but did adopt the PSR's underlying factual findings. [Sentencing Tr. at 19] Generally, "where the district court has received the PSR and the defendant's objections to it, allowed argument to be made and then adopted the PSR, no more

is required under Rule 32(c)(3)(D)." *United States v. Williams*, 41 F.3d 496, 498 (9th Cir. 1994). It is "well settled," however, that the court may not adopt "conclusory statements unsupported by the facts or the Guidelines." *Id.* The district court's adoption of the PSR's conclusion that Woodbridge abused his trust or used a special skill in committing the possession offense was clearly erroneous.

The Government's argument on this point is that firearms licensees are afforded a position of public trust and that the possession of unregistered firearms constitutes an abuse of that trust. Finally, the Government argues that Woodbridge's expertise facilitated the possession offenses.

U.S.S.G. 3B1.3 "was intended to punish those who abuse their special skills by using them to *facilitate* criminal activity. . . . " *United States v. Mainard*, 5 F.3d 404, 406 (9th Cir. 1993). Similarly, the position of trust "must have contributed in some substantial way to facilitate the crime and not merely have provided an opportunity that *could as easily have been afforded to other persons.*" *United States v. Cuff*, 999 F.2d 1396, 1397 (9th Cir. 1993) (emphasis added) With respect to abuse of position, "the critical inquiry is the extent to which the position provides the freedom to commit a difficult-to-detect wrong." *Id.*

In the case at bar, there is nothing in the record to suggest that Woodbridge's possession offenses were "significantly facilitated" either by his expertise or his status as a firearms licensee. The Government presented no evidence that Woodbridge actually manufactured or assembled the charged weapons. Further, the record contains no indication that Woodbridge's license enabled

him in some way to acquire the illegal weapons and parts.[6] Thus, the district court erred in enhancing Woodbridge's sentence under § 3B1.3. We vacate Woodbridge's sentence and remand for resentencing on this point only.

(b) Refusal to apply sport/collector reduction

Pursuant to U.S.S.G. § 2K2.2(b)(3) (currently section 2K2.1(b)(2)), defendant sought a six-point reduction for possession of a firearm solely for sport or collection. The Application Notes to section 2K2.1(b)(1) make clear that "intended lawful use" of an illegal weapon must be determined by the surrounding circumstances, including "the number and type of firearms . . . and ammunition, the location and circumstances of possession, the nature of the defendant's criminal history . . . and the extent to which possession was restricted by local law." U.S.S.G. § 2K2.1(b)(1), comment. (n.2).

Local law, at the time of Woodbridge's offense, provided that "it is unlawful for any person to . . . have in possession or under control, any machinegun, or any part thereof capable of use or assembling or repairing any machinegun." RCW § 9.41.190. *See also United States v.*

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[6] *Compare United States v. Christiansen*, 958 F.2d 285, 288 (9th Cir. 1992) (credit union manager used her position to embezzle funds and conceal the theft for extended period of time); *United States v. Pascucci*, 943 F.2d 1032, 1037 (9th Cir. 1991) (U.S. Marshall used his contacts at the Marshall's Service to obtain information about an individual for the purpose of extortion and blackmail); *United States v. Foreman*, 926 F.2d 792, 795-97 (9th Cir. 1990) (police officer used her position to attempt to deflect investigation of her drug trafficking activities).

Pope, 871 F.2d 506, 508-509 (5th Cir. 1989), *cited with approval in United States v. James*, 957 F.2d 677 (9th Cir. 1992) ("[O]nly a lawful collection of guns can be considered as a mitigating factor under § 2K2.2(b)(3)" but collector reduction might apply where legitimate gun collector possessed lawful collection of guns, but one of the firearms had an altered serial number.) In addition, the "location and circumstances of [Woodbridge's] possession were inconsistent with a sporting use.["] In brief, two of the AR-15's and the Sten and Thompson receivers were found at Woodbridge's place of business. The receivers were paired and wrapped in paper. Also inconsistent with a sporting use is the fact that the "Big Al" gun was found loaded in Woodbridge's bedroom, suggesting a personal protection use. *See United States v. Uzelac*, 921 F.2d 204, 206 (9th Cir. 1990) ("The shotgun was kept fully loaded while it was on the display rack, a condition perhaps more consistent with use for personal protection than use as a hunting weapon.") *See also United States v. Lam*, 20 F.3d 999, 1002 (9th Cir. 1994) (emphasis added) ("[W]e do see a good deal of logic in the Commission's decision to limit the reduction to those who hold a weapon for lawful sporting or collection purposes. Neither of those purposes encompasses the killing or maiming of human beings, *but personal protection surely does.* Moreover, a personal protection reduction would open a great hole in the Guidelines."). The district court did not err in holding that Woodbridge was not entitled to a reduction for sporting or collection purposes.

(c) Silencer enhancement

Defendant contends that this court should apply the current version of U.S.S.G. § 2K2.1, which contains no provision for a silencer enhancement. We disagree. Normally, a district court is to apply the version of the Sentencing Guidelines and policy statements in effect on the date of sentencing except where amended versions of the Guidelines are ex post facto (i.e., disadvantage the defendant). In such cases, a defendant is to be sentenced in accordance with the guidelines in effect at the time of the offense. *United States v. Schram*, 9 F.3d 741, 742 (9th Cir. 1993). In the case at bar, the PSR recommended that the 1988 Guidelines in effect on the date of Woodbridge's offense apply because they were "more favorable to the defendant than the current edition of the guidelines manual." *See* PSR at 2. This indeed appears to have been the case. Under the 1988 Guidelines, Woodbridge's base offense level was 12. The 1993 Guidelines specify a base offense level of 18. *See* 2K2.1(a)(5) (Nov. 1993). Apparently agreeing with the PSR's assessment, defendant made no objection to the court's use of the 1988 Guidelines at his sentencing hearing and even stated in his Objections to the PSR that he agreed with the PSR's "reliance on the 1988 guidelines provision." [CR 95]

On appeal, defendant asks us to apply certain provisions of the 1993 Guidelines in effect at the time of sentencing. This request contravenes the Ninth Circuit's pronouncement that sentences should "be determined under one set of Guidelines rather than applying the Guidelines piecemeal." *United States v. Warren*, 980 F.2d 1300, 1306 (9th Cir. 1992). *See also* U.S.S.G. § 1B1.11 (Nov. 1993). For this reason, defendant is not entitled to rely on

the fact that current Guidelines contain no enhancement for a silencer.

The district court did not err in using the silencer provision to enhance Woodbridge's sentence under U.S.S.G. § 2K2.2(b)(2). Possession of the silencer in conjunction with the Palmetto firearm was relevant conduct appropriate for consideration by the district court. U.S.S.G. § 1B1.3.

(d) Multi-count grouping guideline

Defendant next contends that the court erred in enhancing his sentence by breaking the twelve counts into two separate groups of closely related offenses: (1) Counts I-III and Counts V-XII and (2) Count IV. Count IV was separated from the other counts because the Palmetto was equipped with a silencer. Defendant contends that the twelve counts should have been treated as a single group pursuant to U.S.S.G. § 3D1.2, which would have allowed him to be sentenced for one aggregate offense with one offense level.

Under the 1988 Guidelines, offenses covered by U.S.S.G. § 2K2.2 (currently 2K2.1) were not listed in § 3D1.2 as offenses subject to single group treatment. Section 3D1.2 did, however, make clear that if an offense was not listed, the sentencing court could use its discretion to afford a defendant single group treatment. Such a decision was to be made on a case-by-case basis, taking into account whether the counts involved "substantially the same harm."

The version of the Guidelines in effect at the time of defendant's sentencing differs from the 1988 version in that it lists section 2K2.1 as an offense category subject to grouping. Defendant contends that because the current Application Notes clarify that all section 2K2.1 offenses should be grouped together, grouping treatment should have applied retroactively. *See United States v. Garcia-Cruz*, 40 F.3d 986 (9th Cir. 1994) (amendments to the Sentencing Guidelines which are merely "clarifying" as opposed to "substantive" may be given retroactive effect). Defendant is incorrect. U.S.S.G. Appendix C explicitly denotes those amendments meant to have only a clarifying effect. Appendix C contains no indication that the inclusion of section 2K2.1 in section 3D1.2 was intended to have only a clarifying effect. In fact, the Appendix reveals that section 2K2.2 was included in section 3D1.2 to "make[ ] the listing of offenses in §3D1.2(d) more comprehensive." U.S.S.G. Appendix C at 194, note 349 (Nov. 1990). Thus, the district court had the discretion to treat Count IV as a separate group.

The district court did not err in separating Count IV from the other counts based on the fact that the Palmetto had a silencer. *See United States v. Bakhtiari*, 913 F.2d 1053 (2d Cir. 1990) (noting that possession of semiautomatic pistol and possession of silencer do not involve "substantially the same harm" because silencer transforms an unmuffled gun into a far more threatening weapon); *United States v. Pope*, 871 F.2d 506, 509 (5th Cir. 1989) (same). Further, U.S.S.G. § 3D1.2(c) provides that single group treatment is appropriate "[w]hen one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline

applicable to another of the counts." Here, the Palmetto's silencer was not treated as a specific offense characteristic with respect to the other eleven counts.

CONCLUSION

We affirm Woodbridge's conviction, but vacate his sentence and remand for resentencing consistent with this disposition. **AFFIRMED IN PART; VACATED AND REMANDED IN PART.**

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ALLAN EDWARD WOODBRIDGE, Defendant-Appellant.	No. 94-30213 D.C. No. CR-93-02548-JET **ORDER** (Filed May 25, 1995)

Before: SKOPIL, HALL, and WIGGINS, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing. Judges Hall and Wiggins have voted to reject the suggestion for rehearing en banc and Judge Skopil recommends rejection.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.